(3)

Office - Supreme Court, U.S.
FILED
FEB 12 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-955

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

Anne C. Bell
Petitioner,

v.

Lowry M. Bell, Jr.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Charles J. Humphreys,
Counsel of Record

Roberta F. Sawyer

15 Brook Street
Cohasset, Massachusetts 02025
(617) 383-0600

Attorneys for Respondent

BEST AVAILABLE COPY

27pp

QUESTION PRESENTED

Did the trial court properly interpret the provision in the parties' separation agreement which terminated the ex-wife's entitlement to alimony when she began "living together with a member of the opposite sex, so as to give the outward appearance of marriage?"

TABLE OF CONTENTS

		Page
Question Presented		i
Table of Contents		ii
Table of Authorities		iii
Argument		1
I.	THE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL ARGUMENTS IN THE LOWER STATE COURT PROCEEDINGS, AND THE COURTS BELOW DID NOT ADDRESS ANY CONSTITUTIONAL ISSUES	3
II.	THE ISSUE PRESENTED IS SIMPLY THE INTERPRETATION OF A SEPARATION AGREEMENT, WHICH FALLS WITHIN THE TRADITIONAL DOMESTIC RELATION EXCEPTION TO FEDERAL COURT JURISDICTION	9
III.	THE ALLEGED CONSTITUTIONAL ISSUES ARE INSUBSTANTIAL AND ARE NOT WORTHY OF ATTENTION FROM THIS COURT	12
Conclusion		22

TABLE OF AUTHORITIES

	Page
Barber v. Barber, 62 U.S. (21 How.) 582 (1858)	10,12
Cardinale v. Louisiana, 394 U.S. 431 (1969)	5,9
Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983)	7
Corbitt v. New Jersey, 439 U.S. 212 (1978)	21
Duignan v. United States, 274 U.S. 195 (1927)	4,9
Eisenstadt v. Baird, 405 U.S. 438 (1972)	17
Griswold v. Connecticut, 381 U.S. 479 (1965)	17
Honeyman v. Hanan, 300 U.S. 14 (1937)	5
In re Burrus, 136 U.S. 586 (1890)	10
Lynch v. New York, 293 U.S. 52 (1934)	5
New Orleans v. Dukes, 427 U.S. 297 (1976)	20
Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930)	10,12

Page

Paul v. Davis, 424 U.S. 693 (1976) 17,18

Penney v. First National Bank, 385 Mass. 715, 433 N.E.2d 901 (1982) 7-8

Phillips v. Youth Development Program, Inc., 390 Mass. 652, 459 N.E.2d 453 (1983) 7

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 6

Rinaldi v. Yeager, 384 U.S. 305 (1966) 20

Roe v. Wade, 410 U.S. 113 (1973) . . . 17

Tigner v. Texas, 310 U.S. 141 (1940) 20

Wick v. Chelan Electric Co. 280 U.S. 108 (1929) 12-13

Zucht v. King, 260 U.S. 174 (1922) 13

Other Authority

28 U.S.C. § 1257 5

ARGUMENT

This case involves nothing more than the interpretation of a provision in the separation agreement reached by the parties prior to their divorce in 1976. Under this agreement, which was entered into freely by both parties under advice of counsel, the petitioner Anne C. Bell (referred to in this brief as "the wife") was entitled to monthly alimony payments for fifteen years subject to the following contingencies: (1) the wife's death; (2) the wife's remarriage; or (3) the wife's "living together with a member of the opposite sex, so as to give the outward appearance of marriage." In 1981, the respondent Lowry M. Bell, Jr. ("the husband") notified the wife that he was terminating alimony payments because of the wife's continuing cohabitation with a man. The wife litigated her entitlement to alimony and lost, the trial court agreeing with the husband

that the wife's continuous relationship with a man gave the outward appearance of marriage, thus satisfying the third contingency of the contract. The trial court's interpretation and decision was upheld by the Supreme Judicial Court of Massachusetts.

Not satisfied with these state court decisions, the wife is now seeking another review of the trial court's decision, and in an attempt to invoke this Court's jurisdiction she has tried to put a constitutional gloss on her former argument of contractual construction or interpretation. For several reasons, this Court should decline to hear this case. First, the state courts at no time considered or addressed any federal question or constitutional issues. Second, because the case simply involves a wife's entitlement to alimony under a separation

agreement, it is a domestic relations case, an area of law in which federal courts have traditionally declined to become involved. Finally, even assuming for the moment that the wife had raised her constitutional claims appropriately in the lower courts, her constitutional arguments are wholly insubstantial and are without merit.

I. THE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL ARGUMENTS IN THE LOWER STATE COURT PROCEEDINGS, AND THE COURTS BELOW DID NOT ADDRESS ANY CONSTITUTIONAL ISSUES.

This case was argued and decided at three separate levels in the Massachusetts courts solely on the basis of state law. At no time in the courts below was any issue other than contractual interpretation before the courts for decision. Although the wife contends in her petition that "[t]he federal

questions which petitioner asks this Court to review were briefed and argued before the Massachusetts Supreme Judicial Court," (Petitioner's Brief at 17, n.5), this is clearly a distortion of the facts. The only point in the entire proceedings at which the constitutional arguments were even mentioned was in the petitioner's supplemental brief to the Supreme Judicial Court. Further, in its opinion the Supreme Judicial Court specifically stated that it was declining to consider such issues because they were not raised at the trial court or the Appeals Court. (Appendix at A-10)

Thus, this case falls squarely within this Court's well-established rules that it will not consider issues not ruled upon below, Duignan v. United States, 274 U.S. 195 (1927), and that the Court will not review a

state court judgment in which no federal question was considered. Cardinale v. Louisiana, 394 U.S. 431 (1969); Honeyman v. Hanan, 300 U.S. 14 (1937); Lynch v. New York, 293 U.S. 52 (1934). It is essential to this Court's jurisdiction in reviewing a state court decision that the record affirmatively show not only that a federai question was presented for decision to the highest court of the state, but that it was actually decided. Honeyman v. Hanan, supra; see 28 U.S.C. § 1257.

In this case, the wife acknowledges these general rules, but attempts to argue around them by claiming that she raised her constitutional claims "at the earliest opportunity" after an "unforeseeable and indefensible" ruling by the Supreme Judicial Court. (Petitioner's Brief at 7-8)

The wife's reliance on this theory is misplaced. At a minimum, the fact that the trial court ruled against her would indicate that the Supreme Judicial Court's ruling reaching the same conclusion was not "unforeseeable" and could have been anticipated. Despite the unfavorable trial court decision, the wife did not raise her constitutional claims in the Appeals Court, instead waiting until submitting her supplemental brief to the Supreme Judicial Court.

Further, the wife cannot rely on the narrow exception to the general rule reflected in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), and the cases noted in footnote 9 of that decision. The exception described and applied in PruneYard arises where a state supreme court unexpectedly overrules its own prior decision in a case

presenting the exact same issue as the prior case. In this case, the wife's lengthy discussion of Massachusetts law (Petitioner's Brief at 8-17) serves to underscore the fact that there have been no Massachusetts decisions which involve the particular contractual provision at issue in this case--or any similar provisions--so the wife cannot claim any reliance on a prior holding which was unexpectedly reversed.

The Massachusetts courts have consistently held that a party cannot raise issues on appeal which were not raised below. Phillips v. Youth Development Program, Inc., 390 Mass. 652, 459 N.E.2d 453 (1983) (constitutional issue not raised); Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983) (same); Penney v. First National Bank, 385 Mass. 715, 433

N.E.2d 901 (1982). Thus, the wife was well aware of the need to raise all issues at an earlier stage than the second round of appeals. This well-established rule, together with the complete absence of any prior controlling Massachusetts case law on her claims, operates to prevent the wife from arguing that she should be excused from raising her constitutional claims at the appropriate stage of the proceedings.

No purpose would be served by having this Court decide the wife's constitutional claims in light of the fact that the lower courts have not addressed them. The wife cannot now invoke this Court's jurisdiction since not only has the Supreme Judicial Court of Massachusetts failed to decide a federal question of substance, it has not decided a federal question at all. Thus, under the

guidelines of Rule 17 of this Court, and pursuant to clearly established precedent, see Duignan v. United States, supra; Cardinale v. Louisiana, supra, this is a totally inappropriate case for this Court's review.

II. THE ISSUE PRESENTED IS SIMPLY THE INTERPRETATION OF A SEPARATION AGREEMENT, WHICH FALLS WITHIN THE TRADITIONAL DOMESTIC RELATION EXCEPTION TO FEDERAL COURT JURISDICTION.

As discussed above, this case presents the simple issue of the interpretation of a separation agreement between a husband and wife which they entered into prior to their divorce. Although the wife has couched her claim before this Court in the guise of a federal question, the true underlying issue is whether the wife is entitled to alimony under the terms of the agreement. As such, the case clearly falls within the category of

domestic relations cases which the lower federal courts and the Supreme Court have traditionally--and rightfully--left to the states for adjudication.

This Court has long recognized that domestic relations cases are inappropriate cases for Supreme Court review. As this Court stated in Ohio ex rel. Popovici v. Agler: "[T]he jurisdiction of the Courts of the United States over divorces and alimony always has been denied." 280 U.S. 379, 383 (1930); see also In re Burrus, 136 U.S. 586 (1890); Barber v. Barber, 62 U.S. (21 How.) 582 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony. . . .").

The underlying reasons for the reluctance of federal courts to become involved in

domestic relations disputes are particularly apt in the present case. The dispute centers around the application of Massachusetts law regarding separation agreements and their interpretation. No substantial federal issue has been raised, even though the wife has attempted to fashion a constitutional claim (see Argument III, infra). The trial court, acting within its discretion, found that the wife's conduct satisfied the contingency clause of the parties' separation agreement. In doing so, the court concluded that the wife's relationship with her cohabitant gave the outward appearance of marriage under Massachusetts law.

Such purely state law domestic issues clearly are within the proficiency and expertise of state courts, and would not afford a basis for federal jurisdiction under the

principles set forth in Barber v. Barber, supra, and Ohio ex rel. Popovici v. Agler, supra. Thus, it would be completely inappropriate for this Court to undertake a review of the domestic issues at this point.

III. THE ALLEGED CONSTITUTIONAL ISSUES ARE INSUBSTANTIAL AND ARE NOT WORTHY OF ATTENTION FROM THIS COURT

The wife has contended in her petition that her rights to equal protection and to privacy were violated by the enforcement of the separation agreement which she contracted with her husband. These claims are wholly without merit and are not worthy of consideration by this Court.

It is clearly established that this Court will not review cases which present insubstantial or frivolous federal claims. Wick v. Chelan Electric Co., 280 U.S. 108

(1929); Zucht v. King, 260 U.S. 174 (1922). Moreover, Supreme Court Rule 17 indicates that a review on writ of certiorari will be granted only when there are "special and important" reasons, such as when a state court has decided an "important" question of federal law. As discussed above in Argument I, in this case the Massachusetts court did not even address--much less decide--any important questions of federal law, and therefore the wife's constitutional claims are not properly before the Court. Even if they were, however, it is clear that they do not hold up under close scrutiny and analysis.

First, the wife has completely misstated the findings of the trial court in her statement of the Questions Presented. (Petitioner's Brief at i) Contrary to the wife's assertion

that her support payments were terminated "solely upon the ground of petitioner's intimate association with an unrelated man on a regular basis," in fact her support was terminated pursuant to a provision in a separation agreement to which she had freely contracted. This provision explicitly allowed the husband to terminate the wife's alimony payments if she was "living together with a member of the opposite sex, so as to give the outward appearance of marriage." After examining the evidence, the trial court and the Supreme Judicial Court of Massachusetts agreed that the wife's relationship with her cohabitant gave the outward appearance of marriage. Although the wife consistently misstates the basis for the trial court's decision, the simple fact is that it did not rest either "solely" or in

any way on the examination of intimate details of the wife's relationship. Rather, the court's decision rested on factors demonstrating the "outward" appearance of marriage which is listed in its conclusions of fact and conclusions of law. In the trial court's own words:

> The plaintiff's relationship with J.R., consisting of sharing a residence, socializing as a couple, eating their meals together, taking trips as a couple, and attending functions together would lead a reasonable person to believe that they were living in a marital relationship.

(Appendix at A-60) These factors are set forth in more detail over several pages in the trial court decision. (Appendix at A-52-60) Nowhere in the trial court's opinion is there any discussion of any intimate details of the wife's relationship, nor is there any reference to any such intimate

details in the opinion of the Supreme Judicial Court. In short, both decisions rested on many different examples of outward and public evidence of a marital relationship. Thus, the wife displays a reckless disregard for the truth when she states on page 25 of her brief, after referring to two questions at trial establishing that she and her cohabitant sleep in the same room, that "the construction of the outward appearance clause by the court below rests exclusively on this testimony." Similarly, it is simply false and deceptive for the wife to state that the court focused "exclusively" on the wife's "intimate conduct within the privacy of her own home." (Petitioner's Brief at 28)

Since the decisions of the courts below rested on testimony regarding the public and outward signs of a marital relationship,

rather than the nature of her private relationship, the wife has failed to show the most basic element in her claim--a violation of her privacy. See Paul v. Davis, 424 U.S. 693 (1976) (declining to extend right of privacy to claim based on publication of public facts). Moreover, she has failed to demonstrate any governmental intrusion into her privacy, since the issue arose from the enforcement of a contract provision to which she freely consented. In other words, the decision of the Massachusetts court simply gave effect to an agreement to which the wife was a party in drafting. The cases cited by the wife in support of her position, such as Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973), are all inapposite to her argument. Each of these

cases involved a state statute unilaterally prohibiting conduct or an activity which touched on the intimate affairs of individuals. No case from this court has gone so far as to suggest that the right of privacy prevents a court from using public facts in interpreting and enforcing a specific provision of an agreement reached freely between two parties. Cf. Paul v. Davis, supra.

The wife spends much of her brief discussing statutes and decisions from other states in an attempt to show the national significance of this case. (Petitioner's Brief at 29-34) However, the wife ignores the fact that the cases and statutes have absolutely no relevance to the issue decided by the Massachusetts courts, since they do not involve separation agreements which spe-

cifically call for termination of alimony upon the wife's entering into a relationship with the outward appearance of marriage. While some may argue that in the absence of such an agreement it would be a violation of privacy for the state independently to inquire into the living arrangements of a recipient of alimony, that is not the issue in this case and thus it cannot now be decided by this Court.

The wife has further attempted to make an equal protection claim, apparently arguing that because many states have statutes which create an "arbitrary classification wholly without rational basis," this Court must step in to place limits on the courts and legislatures. (Petitioner's Brief at 31-33) Again, it must be stressed that no state legislation was involved in this case, and the rulings

below turned on the particular language of the agreement between the parties. Thus, any alleged "classification" of the wife was entirely rational, and the wife cannot claim to be similarly situated to other individuals who have their alimony terminated in the absence of an express separation agreement provision calling for such termination upon the fulfillment of certain contingencies. It is a fundamental tenet of constitutional law that a victim of discrimination under the equal protection clause must show that he or she has been arbitrarily treated differently than others who are similarly situated. New Orleans v. Dukes, 427 U.S. 297 (1976); Rinaldi v. Yeager, 384 U.S. 305 (1966). As Justice Frankfurter wrote:

> The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

Tigner v. Texas, 310 U.S. 141, 147 (1940).

In this case the wife chose to enter

into a separation agreement which called for the termination of alimony under particular circumstances, thus differentiating herself from other spouses who did not enter into any such agreements. She has not shown that a Massachusetts court would have terminated her alimony in the absence of such an agreement. Thus, she cannot now claim that she falls within a classification of others from whom she can easily be distinguished. She chose to enter into the contractual provision, and now she must abide by it even though it has proved to have been disadvantageous to her. As this Court has said in a different context:

> Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision.

Corbitt v. New Jersey, 439 U.S. 212, 226 (1978).

CONCLUSION

Unhappy with the lower courts' interpretation of the parties' separation agreement and ruling on the evidence, the wife has belatedly argued some insubstantial constitutional claims to get one more chance for a favorable ruling. For all of the reasons set forth above, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

Charles J. Humphreys,
Counsel of Record

Roberta F. Sawyer

15 Brook Street
Cohasset, Massachusetts 02025
(617) 383-0600

Attorneys for Respondent